



U.S. Department  
of Transportation

Federal Highway  
Administration

# Memorandum

**Subject:** Pre-submission Evaluation of Information  
under the Freedom of Information Act

**Date:** January 26, 2005

**From:** Chief Counsel

**Reply to**  
**Attn. of:** HCC-40

**To:** Assistant Chief Counsels

A proposal for a public-private partnership submitted under the Federal Highway Administration's (FHWA) Special Experimental Program No. 15 (SEP-15) may include proprietary information that might be exempt from public disclosure under the Freedom of Information Act (FOIA). Even though the private sponsor recognizes the importance of submitting the information to the Federal government, a submitter of information wishes to have a high degree of confidence, before submitting the information to FHWA, that the information will not be disclosed by the Department of Transportation (DOT) if requested under FOIA.<sup>1</sup> The uncertainty of whether the information would be subject to release under FOIA, serves as a disincentive to private sponsors to propose innovative ideas. To address this impediment to the use of PPPs on Federal-aid highway projects, the following procedure shall be made available to PPP project partners prior to the submission of a formal PPP proposal.

1. A representative of FHWA and an attorney from the Office of Chief Counsel (HCC) will examine the records at a place not under the control of any Federal agency (such as a private office).
2. The FHWA representative and HCC attorney will identify those records for which they are confident of DOT's authority to withhold them if requested under FOIA.
3. FHWA will not take any of the records with us when we leave the place of examination.
4. The submitter may then submit to FHWA the records in item 2, above.

The attachment to this memorandum is a direct quotation from the Department of Justice's *Freedom of Information Act Guide* on the threshold question of what records are subject to FOIA. The procedure that we have used follows closely the four-part test set forth there, as follows:

1. The intent of the record's creator to retain or relinquish control over the records. The very use of this procedure is strong evidence of this element.
2. The ability of the agency to use and dispose of the record as it sees fit. Since neither the FHWA representative nor HCC attorney will take any of the records, they will lack the ability to use or

<sup>1</sup> DOT regulations implementing FOIA require that, before any element of DOT may issue a final denial of a FOIA request, the DOT General Counsel's Office must concur. See 49 CFR Part 7. Hence, any commitment by an element of DOT not to disclose information under FOIA must also have the concurrence of the General Counsel's Office.

dispose of them. Examining them at a place not under the control of any Federal agency denies FHWA the "control" required by the Supreme Court.

3. The extent to which agency personnel have read or relied upon the record. Although FHWA will have examined the records enough to come to judgments about DOT's ability to withhold them if requested under FOIA, FHWA will not be among those who work on whatever records the submitter elects to submit, so the records will not be relied upon.

4. The degree to which the record was integrated into the agency's recordkeeping system or files. None of the records that FHWA examines will become part of a DOT recordkeeping system unless and until the submitter submits them.

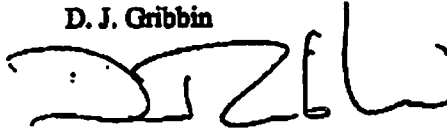
As to any records for which we give assurance and that are submitted to FHWA, DOT will provide the following commitments in writing:

1. The information will be treated as confidential by DOT.
2. DOT will withhold the information if it is sought under FOIA.
3. If taken to court on our decision to withhold the information under FOIA, DOT will forcefully argue to the Department of Justice the validity of that decision and urge it to defend that decision by all appropriate means.

We cannot, of course, commit the Department of Justice to any particular litigation position, nor can we bind a court to a decision in our favor.

If you have any questions about these procedures, please contact attorney Robin Fields, Administrative and Technology Law Division, at 202-366-1355.

D. J. Gribbin



Attachment

### Attachment

From the Department of Justice *Freedom of Information Act Guide* (May 2002)

"The Supreme Court has articulated a basic, two-part test for determining what constitutes "agency records" under the FOIA: "Agency records" are records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.<sup>1</sup> Inasmuch as the "agency record" analysis usually hinges upon whether an agency has sufficient "control" over a record,<sup>2</sup> courts have identified four relevant factors for an agency to consider when making such a determination: the intent of the record's creator to retain or relinquish control over the record; the ability of the agency to use and dispose of the record as it sees fit; the extent to which agency personnel have read or relied upon the record; and the degree to which the record was integrated into the agency's recordkeeping system or files.<sup>3</sup>

"1. United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989) (holding that court opinions in agency files are agency records).

"2. See, e.g., Int'l Bhd. of Teamsters v. Nat'l Mediation Bd., 712 F.2d 1495, 1496 (D.C. Cir. 1983) (determining that submission of gummed-label mailing list as required by court order not sufficient to give "control" over record to agency); McErlan v. United States Dep't of Justice, No. 97-7831, 1999 WL 791680, at \*11 (S.D.N.Y. Sept. 30, 1999) (finding that agency had no "control" over requested records because it assented to dissemination and use restrictions requested by confidential source who provided them); KDKA v. Thornburgh, No. 90-1536, 1992 U.S. Dist. LEXIS 22438, at \*\*16-17 (D.D.C. Sept. 30, 1992) (concluding that Canadian Safety Board report of aircrash, although possessed by National Transportation Safety Board, is not under agency "control," because of restrictions imposed by Convention on International Civil Aviation); Teich v. FDA, 751 F. Supp. 243, 248-49 (D.D.C. 1990) (holding that documents submitted to FDA in "legitimate conduct of its official duties" are agency records notwithstanding FDA's pre-submission review regulation allowing submitters to withdraw their documents from agency's files (quoting Tax Analysts, 492 U.S. at 145)); Rush v. Dep't of State, 716 F. Supp. 598, 600 (S.D. Fla. 1989) (finding that correspondence between former ambassador and Henry Kissinger (then Assistant to the President) were agency records of Department of State as it exercised control over them); McCullough v. FDIC, 1 Gov't Disclosure Serv. (P-H) ¶ 80,194, at 80,494 (D.D.C. July 28, 1980) (concluding that reports transmitted to agency by state regulatory authorities were agency records because "it is questionable whether [state authorities] retained control" over them); see also FOIA Update, Vol. XIII, No. 3, at 5 (advising that records subject to "protective order" issued by administrative law judge remain within agency control and are subject to FOIA).

"3. See Tax Analysts v. United States Dep't of Justice, 845 F.2d 1060, 1069 (D.C. Cir. 1988) (citing Lindsey v. Bureau of Prisons, 736 F.2d 1462, 1465 (11th Cir. 1984)), aff'd, 492 U.S. 136 (1989); see, e.g., Katz v. NARA, 68 F.3d 1438, 1442 (D.C. Cir. 1995) (holding that autopsy x-rays and photographs of President Kennedy, created and handled as personal property of Kennedy estate, are presidential papers, not records of any agency); Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1400-01 (7th Cir. 1984) (determining that agency "use" of internal report submitted in connection with licensing proceedings renders report

an agency record); Wolfe v. HHS, 711 F.2d 1077, 1079-82 (D.C. Cir. 1983) (holding that transition team records, although physically maintained within "four walls" of agency, were not agency records under FOIA); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11-12 (D.D.C. 1995) (following Wash. Post v. DOD, 766 F. Supp. 1, 17 (D.D.C. 1991), to find that transcript of congressional testimony provided "solely for editing purposes," with cover sheet restricting dissemination, is not an agency record), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996); Marzen v. HHS, 632 F. Supp. 785, 801 (N.D. Ill. 1985) (declaring that records created outside federal government which "agency in question obtained without legal authority" are not agency records), aff'd on other grounds, 825 F.2d 1148 (7th Cir. 1987); Ctr. for Nat'l Sec. Studies v. CIA, 577 F. Supp. 584, 586-90 (D.D.C. 1983) (holding that agency report, prepared "at the direct request of Congress" with intent that it remain secret and transferred to agency with congressionally imposed "conditions" of secrecy, is not an agency record); see also Holy Spirit Ass'n v. CIA, 636 F.2d 838, 841 (D.C. Cir. 1980) (warning that non-"agency record" status "can be lost" if record is "not designated" as such prior to agency's receipt of FOIA request); cf. SDC Dev. Corp. v. Mathews, 542 F.2d 1116, 1120 (9th Cir. 1976) (reaching "displacement-type" result for records governed by National Library of Medicine Act); Baizer v. United States Dept of the Air Force, 887 F. Supp. 225, 228-29 (N.D. Cal. 1995) (holding that database of Supreme Court decisions, used for reference purposes or as research tool, is not an agency record); Waters v. Pan. Canal Comm'n, No. 85-2029, slip op. at 5-6 (D.D.C. Nov. 26, 1985) (finding that Internal Revenue Code is not an agency record).



## ***Florida Department of Transportation***

**CHARLIE CRIST**  
GOVERNOR

605 Suwannee Street  
Tallahassee, FL 32399-0450

**STEPHANIE C. KOPELOUSOS**  
SECRETARY

March 24, 2008

Mr. David Gibbs  
FHWA Division Office  
545 John Knox Road, Suite 200  
Tallahassee, FL 32303

**Re: Amended Request for SEP-15 Approval: Request for Waivers/Variations of TIFIA Program Procedures in Connection with a Competitive Procurement for the I-595 Corridor Roadway Improvements Project and Three Projects to be Named.**

Dear Mr. Gibbs:

This letter constitutes the amended application by the Florida Department of Transportation ("FDOT") for Special Experimental Program 15 ("SEP-15") approval of its plan to more effectively utilize the Transportation Infrastructure Finance and Innovation Act of 1998 ("TIFIA") credit assistance program and thereby leverage additional private co-investment opportunities for surface transportation projects of national significance. These amendments have been developed and reviewed by your staff and staff from the TIFIA Program Office. This request relates to our competitive procurement of the following projects:

- The I-595 Corridor Roadway Improvements Project in Broward County, Florida ("I-595"); and
- Three projects FDOT will name in the future.

Exhibit A of this application includes a description of I-595, which is located on the Interstate Highway System. FDOT will provide the TIFIA Joint Project Office ("TIFIA JPO") more detailed project descriptions for each of the three other projects when FDOT notifies the TIFIA JPO of its intent to seek TIFIA credit assistance for that project.

Due to an expedited procurement schedule for I-595, FDOT would greatly appreciate your timely response to this application. There are three shortlisted proposer teams for I-595 and FDOT anticipates issuing the final Request for Proposals ("RFP") for I-595 on April 1, 2008. As a result, for this experiment to be most effective, FDOT would need a SEP-15 approval and executed Early Development Agreement (EDA) in place as soon as possible in order for proposers to negotiate term sheets with the TIFIA JPO before they submit firm, fixed price proposals for I-595.

As circumstances warrant, FDOT reserves the right to supplement this request to seek approval of other experimental features relating to these projects, including features relating to the design and construction of the projects.

## **Background**

FDOT is developing I-595 through a public-private partnership. Specifically, pursuant to a concession agreement, a private entity (the concessionaire) will have the right and obligation to develop, design, construct, finance, operate and maintain the project improvements. FDOT will compensate the concessionaire on I-595 through availability payments.

FDOT will ask the shortlisted proposers for I-595 to submit final detailed proposals that include financial offers. To promote maximum competition and ensure best value for the public, FDOT anticipates that the I-595 RFP will require the proposers to have the essential and material terms of their loan and equity commitments finalized and conditional loan and equity commitments in hand as of the proposal due date. This element of the procurement is crucial because it allows FDOT to compare the value to the State of each financial proposal and confirm that the proposer is likely to achieve financial close.

If any proposer is interested in seeking TIFIA credit support for I-595, the proposer will need to know whether such credit support is available, the amount available, and the terms and conditions of any TIFIA credit support before it delivers its financial proposal to FDOT. Note that two proposers for I-595 have already indicated an interest in pursuing TIFIA credit support. FDOT anticipates that it will require the proposers to have firm financial commitments and arrangements that will enable them to close project financing, including TIFIA credit assistance, within approximately three months after selection.

## **Purpose of Experiment**

Federal policies encourage price competition and FDOT seeks to foster such competition in all of its procurements. Accordingly, FDOT would like for the proposers' anticipated use of TIFIA credit assistance to become part of this competition. However, FDOT recognizes that it would be unduly burdensome for the TIFIA JPO to process separate TIFIA applications for each proposer during the proposal preparation period, when, ultimately, FDOT will award only one proposer the contract.

Therefore, the primary goal of this request is to effectively utilize the TIFIA program and to streamline the TIFIA approval process in connection with procuring a final proposal for each of the projects by having the TIFIA JPO and interested proposers (including the shortlisted I-595 proposers) meet and agree to a term sheet prior to the proposers submitting proposals. These individualized term sheets would function as the USDOT's commitment to the proposer to execute a TIFIA credit agreement with that proposer using the provisions of the term sheet if FDOT selects that proposer for the project. For I-595, and potentially other FDOT projects included within this request, proposers are required to submit firm, fixed price offers to FDOT that would not otherwise be possible without this experimental feature.

This process will enable proposers to prepare substantially final financial plans and include these plans in their proposals with the reasonable assurance that they can achieve financial close if selected. The price offers made to FDOT will only be valid for a limited period of time, so creating the ability to achieve financial close quickly is an important goal for this request. By

reducing the risk to the proposers that TIFIA assistance may not be available or secured in a timely fashion, FDOT believes that proposers will be encouraged to submit more detailed and complete financial proposals that do not price this risk. The end result should be more competitive financial packages that translate into a reduced need for public funding. Furthermore, TIFIA JPO staff, consultants and officials will be relieved of the burden of having to negotiate full credit agreements with multiple potential borrowers. FDOT expects this approach to produce time savings and innovation in project development and financing.

Although each proposer may refer to the cost information obtained from FDOT's Major Project Finance Plan, each is likely to have a different project financial plan, with different combinations of equity and debt, different debt terms depending in part on whether they are utilizing taxable bonds, Private Activity Bonds, bank loans or privately placed debt and different assumptions concerning project revenues over the term of the concession. Another goal of this request is to streamline TIFIA JPO's financial review process by keeping the TIFIA JPO informed of the legal and financial structure of each of the proposers that wish to use TIFIA credit assistance. At the same time, FDOT will work with the TIFIA JPO to ensure that shared information will be handled in a manner that, consistent with applicable law, preserves the confidential and sensitive nature of proposer financial and legal information, particularly during the ongoing procurement process. This process will result in a seamless final approval of the TIFIA credit assistance and execution of the credit agreement upon final selection by FDOT of a concessionaire.

#### **Experimental Features Relating to USDOT Negotiating TIFIA Credit Assistance Term Sheets With Project Proposers**

The implementing regulations for the TIFIA program appear at 49 CFR 80.1-80.21. These regulations appear to have been drafted based on the assumption that TIFIA applications involving private concessionaires would not be submitted to the USDOT until after the public entity has selected a proposer pursuant to its competitive procurement process. The USDOT would typically then evaluate the selected proposer's application for TIFIA credit assistance and decide whether to approve it. The USDOT, the project sponsor and the lenders would also negotiate and agree on the details of the TIFIA financing in a term sheet and a credit agreement.

FDOT expects the selected proposer to complete its financing arrangements within approximately three months after award with few contingencies. To ensure maximum value to the public from the competitive proposals, FDOT would like the proposers to be able to specifically include TIFIA financing, to the extent available and desired, in their final proposals. FDOT therefore requests the opportunity for project proposers to meet with the TIFIA JPO before submitting a project proposal to agree to individual term sheets for TIFIA credit assistance. Each proposer's term sheet would function as the USDOT's commitment to execute a TIFIA credit agreement with that proposer if FDOT selects that proposer for the Project..

To enable proposers to agree to terms sheets with the TIFIA JPO prior to submitting project proposals, FDOT is asking for several waivers of or variations from the usual TIFIA approval process, in particular, the provisions of Sections 49 CFR 80.7, 80.11 and 80.13. As the procurement process progresses, supplemental requests may be necessary.

## **A. Experimental Feature 1 — Waiver of Letter of Interest Requirements**

FDOT requests that you consider this SEP-15 application to be FDOT's letter of interest to use TIFIA credit assistance for each of the projects. FDOT believes that this deviation is appropriate because (i) FDOT has already provided the general project-related information it could submit in a letter of interest for I-595 in this application and (ii) FDOT cannot provide the additional information normally contained in a letter of interest (e.g., information regarding the project sponsor and that sponsor's plan of finance), because FDOT will not have that information until award of the concession agreement.

Note that while FDOT will not submit a letter of interest for I-595 or the other three projects, it will keep the TIFIA JPO informed of key project information as it becomes available. For example, as the procurement process for these projects proceed, FDOT would provide information regarding the prospective proposers, their qualifications and their legal structures. In addition, FDOT would provide information describing the payment mechanism and limited pro forma data based upon the Major Project Financial Plan for the each of the projects.

Experimental Feature 1 would deviate from Chapter 4, Section 4-1 of the TIFIA Program Guide: FDOT does not believe that this feature requires variances or waivers from any other statute, regulation or policy.

## **B. Experimental Feature 2 — Waiver of TIFIA Application Requirements**

FDOT requests that you consider this SEP-15 application to be FDOT's application to use TIFIA credit assistance for each of the projects. FDOT believes that this deviation is appropriate because FDOT is unable to provide further project-related information, including detailed financial information and definitive information about the final project sponsor, until it awards the concession agreement. For example, FDOT will not have a detailed financing plan, preliminary rating opinion or the other financing documents it would include in a TIFIA application until it receives these documents from the prospective proposers as part of their proposals. As a result, it would be inefficient for FDOT to submit a TIFIA application in addition to submitting this SEP-15 application.

Related to this request, FDOT proposes the following waivers/variances and procedures:

- a. The USDOT's Major Project Guidance for financial plans states that TIFIA applicants are to submit a TIFIA "Plan of Finance" with each TIFIA loan application. The Major Project Guidance also states that the USDOT Secretary of Transportation must approve a TIFIA loan prior to FHWA being able to accept the TIFIA "Plan of Finance" for a project. Furthermore, FHWA's acceptance of this plan is required before a project owner can award a design-build agreement.

FDOT has submitted the Initial Financial Plan for I-595 to the TIFIA JPO. The Initial Financial Plan is based on the Major Project Financial Plan for I-595. The Initial Financial Plan includes sufficient data for the TIFIA JPO to conduct an initial risk



assessment and to give the TIFIA JPO a sense of the detailed financing plans the project proposers may submit to the TIFIA JPO for consideration.

For the purposes of this experiment, the TIFIA JPO's review and approval of the FDOT's Initial Financial Plan for each of these projects will serve as FHWA's "acceptance" of a TIFIA "Plan of Finance" for that project and will authorize FDOT (and project proposers) to continue to pursue TIFIA financing for that project. Under the experimental process proposed, the TIFIA JPO would not be required to secure the USDOT Secretary of Transportation's approval of the TIFIA loan in order to approve the Initial Financial Plan. The TIFIA JPO will document its decision by providing FDOT with a written notice of acceptance. This variance will not change the requirement that the USDOT Secretary of Transportation must ultimately approve any final TIFIA loan. This feature will have the benefit of creating a "Plan of Finance" review and approval process that efficiently approves a project for further consideration before the TIFIA JPO directly negotiates a TIFIA credit assistance term sheet with project proposers.

- b. Instead of FDOT submitting an investment grade letter with this SEP-15 application or in an official TIFIA application, the proposer selected by FDOT as a result of the procurement process will submit to TIFIA an investment grade letter for their senior lien debt and provide a model reflecting that the terms the proposer negotiated with TIFIA in the term sheet are met. Because FDOT is not requiring a simultaneous commercial and financial closing, the timing of this submission would be up to the selected proposer.
- c. To further streamline the TIFIA review process, proposers will have equal opportunity to meet with the TIFIA JPO staff in one-on-one meetings during the period starting when FDOT issues the final RFP for a project and before the proposal due date. At these one-on-one meetings, each interested proposer and the TIFIA JPO would negotiate a term sheet (see Experimental Feature 3).
  - i. The TIFIA JPO will agree in the EDA to nondiscriminatory procedures that will ensure that all proposers receive equal treatment regarding the TIFIA JPO's availability to negotiate, TIFIA's sharing of non-confidential information, TIFIA's credit requirements and similar issues to assure a fair and competitive process;
  - ii. To preserve and maximize competition, both FDOT and the individual proposers will have a strong interest in maintaining the confidentiality of their financial negotiations and in not disclosing to the other proposers the terms and conditions of their respective project financial plans. Accordingly, TIFIA will protect all confidential information it receives from FDOT or the proposers and will adhere to all federal laws and regulations regarding non-disclosure of confidential information. Furthermore, TIFIA will cause its advisors to enter into a confidentiality agreement that will prohibit TIFIA's advisors from disclosing a proposer's ideas, positions taken in negotiations and agreements with the TIFIA JPO.

Experimental Feature 2 would require a waiver from the statutes and regulations set forth in 23 USC 182(b)(2)(B), 49 CFR 80.7(a) and (b), 80.11(a) and 80.15(b). Experimental Feature 2 will also require a waiver from the portion of USDOT's Major Project Guidance related to TIFIA projects and from Chapter 3, Section 3-5 (Rating Opinions), Chapter 4, Section 4-2 (Application), Chapter 5 (Selection Process) and any other requirements or processes related to the application submittal or evaluation process in the TIFIA Program Guide.

### **C. Experimental Feature 3 — Provision of Detailed Term Sheets**

The TIFIA JPO will negotiate and agree to a term sheet for TIFIA credit assistance with each of the proposers interested in pursuing such assistance not later than 15 days before the proposal due date stated in the RFP for a project. Under its usual procedures, the TIFIA JPO would await the conclusion of the procurement process to negotiate a term sheet with the proposer awarded the project. In connection with the experiment suggested above, to ensure that the competitive procurement process results in the best value to the public, FDOT believes it is critical that the shortlisted proposers have a term sheet for TIFIA credit assistance finalized while they prepare the financial plans for their proposals for the purpose of submitting a firm, fixed price offer to FDOT. Furthermore, agreement between the selected proposer and the TIFIA JPO on a term sheet before the proposal due date will facilitate financial close within the time frame required to preserve the validity of the successful bid. Accordingly, FDOT requests that the TIFIA JPO meet with proposers interested in pursuing TIFIA credit assistance to negotiate and agree upon individual term sheets not later than the deadline set forth above.

FDOT does not believe that Experimental Feature 3 requires a waiver or variance from any statute, rule or policy. FDOT has included it in this application out of an abundance of caution and to ensure a thorough description of the anticipated TIFIA application process.

#### **Work Plan**

Critical to the success of the experimental features described above and the use of TIFIA financing for these projects is adherence to work plans and schedules that are consistent with the procurement schedules for the projects. See Exhibit A for a tentative procurement schedule for I-595. FDOT proposes that the EDA include the commitment of the TIFIA JPO and FDOT to a work plan and schedule for I-595.

#### **Goals**

FDOT believes that the process for obtaining federal credit assistance under the TIFIA program in connection with the procurement process as described herein will serve the following goals:

- Expedite delivery of the projects, consistent with available public and private funding and maximize use of public-private partnerships and private equity in project delivery;
- Attract proposals from the highest quality, most capable and innovative domestic and international transportation and infrastructure entities and consortia;
- Encourage flexibility, innovation and alternative approaches to financing, design, construction, operation and maintenance;

- Create a process that encourages private sector competition and creates the maximum opportunity to leverage public contributions with private investment;
- Maximize project eligibility for all available forms of financing, allowing a plan of finance to be developed involving a combination of private sector funds, federal, state and other public funds (including both loans and grants), and leveraging scarce public funds to the maximum extent possible;
- Make the benefits of the TIFIA credit program available to all project proposers through an efficient process; and
- Ensure open, fair and wide competition for development of the projects.

### Measures/Evaluation

This experiment in the process for obtaining federal credit assistance under the TIFIA program, with its innovative features, will be evaluated on a range of factors, including:

1. **Time Savings**: FDOT will (1) compare the actual schedule for receiving TIFIA credit approval and execution of the credit agreement with the concessionaire with the estimated schedule based on a traditional approval process, as well as its previous experiences with the Miami Intermodal Center TIFIA Loans, (2) evaluate the effect of the experiment on the receipt of final proposals and financial close, and (3) attempt to quantify the value of the streamlined TIFIA credit approval approach described herein.

2. **Innovation in Financing**: FDOT will analyze the financing structures and methods developed in connection with the projects and how those structures and methods compare to historical experience with project financing structures and methods for comparable projects. As part of this analysis and comparison, FDOT will particularly focus on the levels of financing and project risk shifted to the private sector and the strategies employed to minimize the public sector's risk.

### Reporting

FDOT anticipates filing an initial report and a post-acceptance report for each of the projects as described below:

- **Initial Report**: FDOT will file the initial report within 120 days after the award of the concession agreement for a project and will include a preliminary analysis of the project procurement. This report will:
  - Describe the process used to select the concessionaire;
  - Identify any reaction by the industry to use of the TIFIA approval process as described herein;
  - Document major innovations contained in the proposals received; and
  - Discuss any major problems or issues that have occurred and how they were resolved.
- **Post Acceptance Report**: FDOT will submit a post acceptance report within 180 days following financial close for a project. This report will provide an overall evaluation of

**the role of the TIFIA approval process for that particular project procurement, including its impact on executing the concession agreement and arriving at financial close.**

**Time is of the essence in obtaining the approval of the experiment requested by this letter in order for FDOT to proceed with the procurement of these projects. We would greatly appreciate your earliest consideration of our application.**

**If you have any questions as you review this application, please contact Marsha Johnson at 850-414-4647. Please do not hesitate to request that our agency and staff meet to provide any clarifications or further explanations that you deem advisable.**

**Sincerely,**

***Gene Branagan***

**Gene Branagan  
Manager, Project Finance**

**GB:smb**

**Attachment**

**Enclosures: Exhibit A**

**cc: Steve Berry, Diane Flowers, Amy Causseaux, Jennifer Weeks**

## **Exhibit A**

### **I-595 Project Description and Tentative Schedule**

#### **I-595 Project Description**

##### **Project Overview**

The I-595 Corridor Roadway Improvements Project (the "Project") consists of the reconstruction of the I-595 mainline and all associated improvements to adjacent cross-roads, frontage roads and ramps from the I-75/Sawgrass Expressway interchange to the I-595/I-95 interchange, for a total project length of approximately 10.5 miles. FDOT will carry out the design, construction, operation and maintenance of the Project, which has an estimated cost of \$1.5 billion, through a concession agreement with a single concessionaire.

##### **Project Objectives**

The primary objectives of the Project are to:

- Optimize mobility in the corridor by maximizing traffic throughput and minimizing congestion in both the express lanes and the general purpose lanes;
- Maintain a high level of quality and safety provisions in the engineering, construction, maintenance and operations services provided by the concessionaire;
- Ensure a premium free-flow service is provided at all times on the express lanes, guaranteeing reliability of travel time; and
- Expedite the Project construction completion while adhering to established NEPA commitments for the Project.

##### **Project Location**

The I-595 corridor is located in central Broward County, Florida. The Project extends from the I-75/Sawgrass Expressway interchange west of SW 136th Avenue to the I-595/I-95 interchange, for a total project length of approximately 10.5 miles. The I-595 corridor passes through or lies immediately adjacent to six governmental jurisdictions: the City of Sunrise, Town of Davie, City of Plantation, City of Ft. Lauderdale, and Town of Dania, as well as unincorporated areas of Broward County.

The majority of the I-595 corridor is comprised of two facilities: I-595 and SR 84. Currently, the I-595 portion of the corridor is a six-lane, limited access facility. SR 84 is typically a four-lane facility, with two lanes in each direction located north and south of I-595. In addition to the interchanges with the two roadway systems at each end of the corridor, there are nine other interchanges along the corridor at the following crossroads: SW 136<sup>th</sup> Avenue, Flamingo Road (SR 823), Hiatus Road, Nob Hill Road, Pine Island Road, University Drive (SR 817), Davie Road, Florida's Turnpike (SR 91) and US 441 (SR 7).

## **Project History**

The Interstate 595 corridor was opened to traffic in 1989, moving high traffic volumes between the western parts of Southeast Florida, and the existing north-south freeways and principal arterials to the east: I-75, Florida's Turnpike, US 441/SR, I-95 and US 1/SR 5. Traffic increased dramatically as a result of Hurricane Andrew in 1992, recovery from the economic recession of the 1980's and changes in local land use plans. The I-595 Freeway Operational Analysis of 1994 evaluated traffic growth and corridor operations, found over-capacity conditions in numerous areas and identified needed short-term improvements. In 2003, the completed I-95/I-595 Master Plan predicted doubling of traffic, congestion, and delay along I-595 by 2020. A long range program of both highway and transit improvements was called for to address future over-capacity traffic conditions along the entire corridor.

## **Design and Construction**

The Project improvements include, but are not limited to, the following design and construction activities:

- Reconstruction, widening, milling and resurfacing of the I-595 and SR 84 roadways (and associated interchange modifications) within the Project limits;
- Construction of three (3) reversible express lanes in the I-595 median, serving express traffic to/from I-75 Sawgrass Expressway from/to I-95 with a direct connection to Florida's Turnpike;
- Additional (auxiliary) lanes that improve facility operations and the safety of vehicles entering and exiting the highway;
- Continuous connection of the SR 84 frontage road between Davie Road and SR 7;
- A new roadway connection (collector – distributor system) between Davie Road and I-95;
- Separated (braided) interchange ramps to eliminate mainline weaving segments;
- Combined ramps and cross-street bypasses to reduce congestion by decreasing the number of entrance and exit points on the highway;
- Noise wall construction;
- Intelligent transportation system deployment; and
- Geometric improvements to the I-595 / Florida's Turnpike interchange and widening / reconstruction of the Florida's Turnpike mainline from Griffin Road to Peters Road to integrate the express lanes direct connection.

The concessionaire selected by FDOT will be responsible for the preparation of all design and construction documents and the construction of the Project improvements.

## **Operations and Maintenance**

During the term of the concession agreement, the concessionaire will operate and maintain (i) the existing I-595 general purpose lanes, SR 84 and associated roadway infrastructure from the date construction commences, and (ii) the Project's capital improvements (with the exception of the express lanes toll system equipment and the Florida's Turnpike mainline) from the date the concessionaire reaches substantial completion. In addition, the concessionaire will be responsible for carrying out the maintenance of all physical elements of the Project facility and ultimately handing back the facility in a manner that is compliant with the handback requirements set forth in the concession agreement.

## **NEPA Approvals**

After review of the Project Development and Environmental (PD&E) Study for the Project, the Federal Highway Administration ("FHWA") approved a Type II Categorical Exclusion for the Project pursuant to the National Environmental Policy Act. This approval, dated June 20, 2006, allowed for the development of the preferred alternative concept (Alternative 2A – reconstruction with three (3) elevated express lanes). In early 2007, FDOT decided to modify the planned improvements by moving the elevated express lanes to ground level in the median of the existing facilities. On November 28, 2007, FHWA provided FDOT with a project reevaluation in which it officially approved the design change and concurred that the change to the previously approved design would not have "social, economic or environmental effects . . . that would significantly impact the quality of the human environment."

## **Express Lanes**

The express lanes will significantly improve the capacity and operations of the I-595 corridor by providing three (3) reversible lanes in the median. The lanes will reverse direction in order to better serve peak traffic demands (eastbound in the a.m. / westbound in the p.m.), removing a portion of the long distance through traffic from the I-595 general purpose lanes. To maximize the operational efficiency, the lanes will be tolled utilizing variable pricing. Access and egress to and from the express lanes will be limited to four (4) exchange points.

Overhead dynamic message signs will guide motorists into or away from the auxiliary lanes leading to the express lanes, depending on the time of day. Opposing traffic will be prohibited from entering the express lanes by access control gates that extend from the inside barrier wall in the area of the auxiliary lanes. Access control barriers and automated security gates will also be used to prohibit motorists from entering or exiting the express lanes in the wrong direction.

Tolls will be collected electronically from a single reversible tolling point. The concessionaire will be responsible for the design, construction, and maintenance of the tolling gantry structure and all related infrastructure, as described in the concession agreement.

Florida's Turnpike Enterprise will provide, install, operate and maintain the electronic tolling equipment for the express lanes, and will manage all SunPass customer services and violation enforcement. FDOT will set the toll rates and retain the toll revenue.

**I-595 Tentative Procurement Schedule**

<b>Activity</b>	<b>Due Date and Time</b>
First Set of ATC Meetings	February 5 – 8, 2008
Submit First Draft SEP-15 Application Regarding TIFIA	February 7, 2008
Utility Coordination Meeting	February 15, 2008
Issue Second Draft of the RFP Documents	February 20, 2008
Prepare and Submit Draft EDA	February 22, 2008
Questions and Comments Due on the Second Draft of the RFP Documents	March 4, 2008
Second Set of One-on-One / ATC Meetings	March 11-14, 2008
Submit Final SEP-15 Application Regarding TIFIA	March 24, 2008
Utility Coordination Meeting	March 28, 2008
TIFIA Approval of SEP-15 Application (One-on-One meetings between TIFIA and proposers begin immediately after approval)	April 8 – 18, 2008
Issue Final RFP	April 18, 2008
Execute the TIFIA EDA	Tentative Date – April 31, 2008
Last day for Proposers to Submit Questions Under ITP Section 2.3	June 3, 2008
Last Day for TIFIA to Provide Proposers with TIFIA Term Sheets	June 16, 2008
Benchmark Interest Rates Provided to Proposers	July 1, 2008
Proposal Due Date	July 11, 2008
Selection/Award	August 29, 2008
Execution of Contract	November, 2008





U.S. Department  
of Transportation  
Federal Highway  
Administration

Office of the Administrator

April 22, 2008

1200 New Jersey Avenue, SE.  
Washington, DC 20590

In Reply Refer To:  
HOA-3

Ms. Stephanie Kopelousos  
Secretary  
Florida Department of Transportation  
604 Suwannee Street  
Tallahassee, FL 32399-0450

Dear Ms. Kopelousos:

*Stephanie*

The Federal Highway Administration (FHWA) has completed its review of the Florida Department of Transportation's (FDOT) Special Experimental Project No. 15 Application (SEP-15 Application) for waivers of the Transportation Infrastructure Finance and Innovation Act (TIFIA) program procedures for the I-595 Corridor Roadway Improvements Project in Broward County, Florida (I-595) and three projects to be named in the future (Projects) that was submitted to the FHWA Florida Division Office (Division Office) on March 24. The Division Office forwarded the SEP-15 Application to the SEP-15 Steering Committee, which coordinated the review of the proposed TIFIA waivers with the TIFIA Joint Program Office (JPO); Office of Infrastructure; Office of Planning, Environment, and Realty; Office of Policy and Governmental Affairs; Office of Chief Counsel; Office of the Chief Financial Officer; and the Division Office. Based on the comments provided by these offices, the SEP-15 Steering Committee recommended, and I concur, that the I-595 project and three projects to be named be accepted for administration under SEP-15. FHWA's response to each of the proposed experimental features for the TIFIA waivers is discussed below.

The FHWA's acceptance of the SEP-15 Application for administration under the SEP-15 program does not constitute approval of the Projects for TIFIA credit assistance, which assistance is subject in all respects to complying with TIFIA requirements and terms and conditions acceptable to the U.S. Department of Transportation (DOT) before a commitment of funds can be made. If you wish to proceed with the TIFIA waivers under the SEP-15 program, our next major action will be to work with you to draft an Early Development Agreement (EDA). The EDA will contain parameters to guide such key elements as the TIFIA application requirements, terms and conditions for conditional approval, the provision of detailed term sheets, specific TIFIA requirements to be addressed in FDOT's procurements for the Projects, meetings with the pre-qualified proposers, and timelines. The EDA will also identify the performance measures that will be used to evaluate the success of the TIFIA experimental features.

#### Background

**AMERICAN  
ECONOMY**